

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No.: 09-O-10823-LMA
)	
THOMAS LEWIS SHELTON)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND ORDER OF
Member No. 209198)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this disciplinary matter, Susan Chan appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Thomas Lewis Shelton did not appear in person or by counsel.

After considering the evidence and the law, the court recommends, among other things, that respondent be disbarred and that he be ordered to make restitution as set forth below.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on October 19, 2010, and was properly served on respondent on that same date at his official membership records address, by certified mail, return receipt requested, as provided in Business and Professions Code section¹ 6002.1, subdivision (c) (official address). Service was deemed complete as of the time of

¹Future references to section are to the Business and Professions Code.

mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The return receipt was returned to the State Bar, executed by an individual whose name was illegible, but whose initials were “J.J.”

On October 27, 2010, respondent was properly served at his official address with a notice advising him , among other things, that a status conference would be held on November 29, 2010.

Respondent did not appear at the November 29, 2010 status conference. On that same date, he was properly served with a status conference order at his official address by first-class mail, postage prepaid.

Respondent did not file a responsive pleading to the NDC. On December 6, 2010, a motion for entry of default was filed and properly served on respondent at his official address by certified mail, return receipt requested. The motion advised him that disbarment would be sought if he was found culpable. Respondent did not respond to the motion.

On December 22, 2010, the court entered respondent’s default and enrolled him inactive effective three days after service of the order. The order was filed and properly served on him at his official address on that same date by certified mail, return receipt requested. The return receipt, executed by “Joe J _____ (illegible),” was returned to the State Bar Court.

The State Bar’s and the court’s efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing on January 10, 2011.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings are based on the allegations contained in the NDC as they are deemed admitted and no further proof is required to establish the truth of those allegations.

(§6088; Rules of Proc. of State Bar², rule 200(d)(1)(A).) The findings are also based on any evidence admitted.

It is the prosecution's burden to establish culpability of the charges by clear and convincing evidence. (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.)

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 2000, and has been a member of the State Bar at all times since.

B. Facts

On October 9, 2003, E.J. Rogers employed respondent to represent him in a matter involving a decedent's estate. (*Estate of Esther Clewis*, Los Angeles County Superior Court case number BP 091 108 c/w BC 366 403.)

On April 26, 2005, E.J. Rogers was appointed administrator of the estate.

In September 2005, respondent and E.J. Rogers caused a principal asset of the estate, specifically real property located on 49th Street in Los Angeles, to be sold. Pursuant to escrow instructions signed by respondent and E.J. Rogers, respondent collected \$112,341.30 in attorney fees out of the sales proceeds.

Under California law, court approval is required prior to the collection of attorney fees from a decedent's estate. Respondent charged and collected this fee without first seeking or obtaining approval of the court or of the other beneficiaries of the estate. Therefore, respondent charged and collected an illegal fee.

California statutory law limits the amount of attorney fees that may be charged in matters involving decedent's estates, but authorizes the probate court to permit additional compensation.

².Future references to the Rules of Procedure are to this source.

In this case, the probate court never authorized respondent to receive attorney fees in excess of the statutory limit. Respondent's fee of \$112,341.30 was far in excess of the statutory limit. Therefore, respondent charged and collected an illegal fee.

As of October 19, 2010, respondent has not refunded any part of the \$112,341.30, nor has he obtained court permission to charge and collect any part of said fee.

At the time the 49th Street property was sold, respondent erroneously advised E.J. Rogers that it was permissible for respondent to collect funds out of the escrow for his attorney fees and for Rogers to collect \$56,887.28 from the escrow for Roger's own use and purpose. Respondent gave this advice even though he knew that the court had not authorized either respondent or Rogers to make these withdrawals from the estate's funds. As a result of this advice, E.J. Rogers and respondent signed escrow instructions by which \$56,877.28 in estate funds were paid to Rogers for his own use and purpose. The court later ordered E.J. Rogers to return the funds to the estate.

Respondent's legal advice to E.J. Rogers was not only erroneous, but self-interested, because it resulted in the payment to respondent of \$112,341.30.

On January 4, 2008, respondent participated in a conference wherein the superior court considered his taking of the \$112,341.30 as attorney fees.

Shortly thereafter, the court issued a minute order stating, in relevant part: "Court finds Mr. Shelton's taking of \$112,341.30 from the sales proceeds was without court authorization.... No later than March 7, 2008, Mr. Shelton is to file a petition deeming fees paid in the amount of \$112,341.30 as contingency fees and set for hearing on April 17, 2008 at 1:30pm." At all times thereafter, the order remained in full force and effect. Respondent received notice of the order shortly after it was issued.

Respondent did not file the required petition and has not done so to date.

At all relevant times, the State Bar was conducting an investigation concerning the matters referenced above. On March 24 and July 20, 2009, the State Bar sent respondent letters requesting a written response to the allegations of misconduct generally set forth above as well as copies of specified documents. Respondent received both of the letters but did not respond to the State Bar.

C. Conclusions of Law

a. Count 1 - Rule of Professional Conduct³ 4-200 (Illegal Fee)

Rule 4-200(A) of the Rules of Professional Conduct prohibits an attorney from entering into an agreement for, charging or collecting an illegal or unconscionable fee.

By charging and collecting \$112,341.30 from the sale proceeds of an asset of the Estate of Esther Clewis, respondent charged and collected an illegal fee in wilful violation of rule 4-200(A).

b. Count 2 - Rule 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By providing erroneous legal advice, respondent intentionally, recklessly, and repeatedly failed to perform legal services with competence in wilful violation of rule 3-110(A).

c. Count 3 - Section 6103 (Violation of Court Order)

In relevant part, section 6103 makes it a cause for disbarment or suspension for an attorney to wilfully disobey or violate a court order requiring him to do or to forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear.

By not filing the petition as ordered, respondent wilfully disobeyed and violated an

³ Future references to rule are to this source.

order of the court requiring him to do an act connected with or in the course of his profession which he ought in good faith to do in wilful violation of section 6103.

d. Count 4 - Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

By violating the court order, respondent committed an act involving moral turpitude, dishonesty and corruption in wilful violation of section 6106. The facts supporting this charge are the same as those supporting the section 6103 violation. Accordingly, the court will not attach any additional weight in determining the appropriate discipline to the wilful violation of section 6106. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155.)

e. Count 5 - Section 6068, subd. (i) (Not Participating in Disciplinary Investigation)

Section 6068, subdivision (i) requires an attorney to participate and cooperate in any disciplinary investigation or other disciplinary or regulatory proceeding pending against him- or herself.

By not responding to the letters of inquiry from the State Bar, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent in wilful violation of section 6068, subdivision (i).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof.

Misconduct⁴, std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

In relevant part, standard 1.2(b)(iii) permits consideration as an aggravating circumstance whether respondent's misconduct was surrounded or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct. In the instant case, out of self-interest, respondent gave inaccurate legal advice that led to his collecting over \$112,000 in attorney fees.

Respondent's misconduct significantly harmed a client and the administration of justice. (Std. 1.2(b)(iv).) Rogers was subjected to a court proceeding and ordered to repay the funds he took from escrow based on respondent's advice. The court had to conduct additional proceedings to address the illegally-obtained attorney fees and payment to Rogers.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Standard 1.2(b)(v).) He has not sought court permission to charge or collect \$112,341.30 in attorney fees nor has he refunded any part of that amount to the estate.

Respondent's failure to participate in these proceedings prior to the entry of default is also an aggravating factor. (Std. 1.2(b)(vi).) However, it warrants little weight in aggravation because this conduct closely parallels that used to find respondent culpable of violating section 6068, subdivision (i) and to enter his default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) Since respondent did not participate in these proceedings, the court has been

⁴.Future references to standard or std. are to this source.

provided no basis for finding mitigating factors. His nearly five years of discipline-free practice is afforded little or no weight. (*Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [six years without prior discipline insufficient].)

C. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.4(b), 2.6(a) and (b) and 2.7 apply in this matter. The most severe sanction is found at standard 2.7 which recommends a six-month actual suspension irrespective of mitigating circumstances for culpability of violating rule 4-200.

The court must also consider standard 1.7(c) which indicates that a prior disciplinary record is not a prerequisite for imposing any appropriate sanction, including disbarment.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91, 92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Respondent has been found culpable, in one client matter, of violating rules 4-200(A) and 3-110(A) as well as sections 6068, subdivision (i) and 6103. In aggravation, the court found multiple acts of misconduct; harm to client and to the administration of justice; indifference and lack of remorse; and not participating in this disciplinary proceeding prior to the entry of default. There were no mitigating factors.

The State Bar recommends disbarment. The court agrees.

The serious and unexplained nature of the misconduct, the lack of participation in these proceedings as well as the self-interest underlying respondent's actions suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

A. Disbarment

The court recommends that respondent Thomas Lewis Shelton be disbarred from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

B. Restitution

It is recommended that respondent make restitution to the Estate of Esther Clewis (Los Angeles Superior Court case no. BP 091 108 c/w BC 366 403) in the amount of \$112,341.30 plus 10% interest per annum from September 1, 2005 (or to the Client Security Fund to the extent of any payment from the fund to the Estate of Esther Clewis, plus interest and costs, in accordance with Business and Professions Code section 6140.5). Restitution is to be made

within 30 days following the effective date of the Supreme Court order in this matter or within 30 days following the Client Security Fund payment, whichever is later (Rules Proc. of State Bar, rule 291). Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

C. Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with rule 9.20, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

D. Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VI. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent Thomas Lewis Shelton, be transferred to involuntary inactive enrollment status pursuant to section 6007, subdivision (c)(4) and *new* rule 5.111(D)(1) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three days from the date of service of this order and will terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: April _____, 2011

LUCY ARMENDARIZ
Judge of the State Bar Court

